CHEN LIAN THAI & LIM SHEN LEE

v.

MALAYSIAN AIRLINE SYSTEM BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL SUIT NO: S1-23-26-1998]
30 JANUARY 2003

CONTRACT: *Claim - Claim for damages and compensation arising from death of deceased in air crash - Basis of claim - Whether may be pursued under Carriage By Air Act 1974 and Carriage By Air (Applications of Provisions) Order 1975*

LIMITATION: *Commencement of action - When action commenced - Article 29, Carriage By Air Act 1974 - Effect of - Whether extinguished right to damages - Whether action failed*

SUCCESSION: *Letters of Administration - Proof of - Whether by asking plaintiffs certified copies of letters of administration, defendant estopped from denying liability*

The plaintiffs, who were the administrators of the estate of the deceased, filed this writ of summons against the defendant for damages and compensation arising from the death of the deceased. The deceased was a passenger who died in the defendant's domestic flight that crashed on 15 September 1995. The issues that arose for determination were whether: (i) the Carriage By Air Act 1974 ('Act') applied to a domestic flight; (ii) art. 29 of the Act extinguished the plaintiffs' claim; and whether (iii) the defendant was estopped from raising the defence of limitation under art. 29 by reason of its request for certified copies of the plaintiffs' letters of administration.

Held:

[1] Order 4 of the Carriage By Air (Applications of Provisions) Order 1975 ('Order') provides that s. 5 of the Act would apply. On this ground, the only basis of claim that may be pursued would be under the Act and the Order. (p 437 a-b)

[2] The terms of art. 29 of the Act differ from the usual terms of the Limitation Act 1953. While the Limitation Act 1953 bars an action, art. 29 extinguishes the right to damages. The effect is that if an action is not brought within two years of the events stated in art. 29(1), it is extinguished. (p 437 d-e)

[3] Article 29(1) provides that the method of calculating time is to be determined by the law of the court being seized of the case. Otherwise, the time from which the time is reckoned is set forth in art. 29(1). (p 437 f-g)

[3b] In this instance, the ordinary calculation for time was applicable. Since the air crash occurred on 15 September 1995, the action ought to have been brought at the latest by 14 September 1997. This action by writ of summons was filed on 8 May 1998, *ie*, seven months and three weeks late. Thus, the plaintiffs' action was filed after the right to damages had been extinguished and it therefore failed. (p 437 g-h)

[4] By asking the plaintiffs to produce the certified copies of the letters of administration, the defendant was not estopped from denying liability. There was nothing in the response of the defendant that conceded liability to the plaintiffs. (p 438 c-e)

[Claim dismissed.]

Case(s) referred to:
Ang Hoi Chin v. Sim Sie Hau [1969] 2 MLJ 3 ***(refd)***
Aries Tanker Corporation v. Total Transport Ltd [1977] 1 All ER 398 HL ***(refd)***
Bank of America National Trust Savings Association v. Cheong Hoon Chong [1982] CLJ 357; [1982] CLJ (Rep) 851 CA ***(dist)***
P Govindasamy Pillay & Sons Ltd v. Lok Seng Chai & Ors [1961] 27 MLJ 89 ***(refd)***
Yew Bon Tew & Anor v. Kenderaan Bas MARA [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 PC ***(refd)***

Legislation referred to:
Carriage By Air Act 1974, ss. 5, 12

For the plaintiffs - D Krishna (Tony Tan); M/s Murphy & Dunbar
For the defendant - Robert Lazar (Moharmustaqeem Mohammed); M/s Shearn Delamore & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Abdul Wahab Patail J:

The plaintiffs Chen Lian Thai and Lim Shen Lee who commenced this action against Malaysian Airline System Berhad are the administrators of the estate of the deceased, Lim Cheng Hai. The deceased was a passenger in the Malaysian Airline System Berhad's ill-fated flight MH 2133 on 15 September 1995 from Kota Kinabalu to Tawau. The aircraft crashed near Kg Sri Menanti, Tawau while attempting to land. The deceased died in that crash.

The plaintiffs filed this writ of summons on 8 May 1998. The plaintiffs had initiated a claim against the defendant on 8 December 1995. On 7 March 1996 the defendant through its solicitors requested for a certified copy of the Letters of Administration/Grant of Probate, and followed up with reminders on 9 September 1996 and 5 June 1997. A copy of the Letter of Administration was sent to the defendant's solicitors on 10 June 1996.

The plaintiffs asserted that in negotiations with the defendant's solicitors, the plaintiffs had agreed to accept the defendant's offer of US$58,000, but the defendant had subsequently refused to honour the agreement.

The defendant asserted that there was no agreement to accept US$58,000 as settlement. The defendant maintained that the offer of US$58,000 was made by letter of 30 July 1997 but it was rejected by the plaintiffs' solicitor's letter of 14 August 1997. The defendant's solicitors requested the plaintiffs to reconsider the offer, but since there was no response, the defendant withdrew its offer on 16 September 1997. As mentioned above the plaintiffs filed this writ of summons on 8 May 1998.

The issues dealt with in submissions are upon the following:

(1) Whether the Carriage by Air Act 1974 (the Act) applies to a domestic flight.

(2) Whether art. 29 of the Act extinguishes the plaintiff's claim.

(3) Whether the defendant is estopped from raising the defence of limitation under art. 29 by reason of its request made for certified copies of the plaintiffs' Letters of Administration.

It is trite that a party is bound by its pleadings. It is equally trite that a trial is conducted to resolve the issues raised in the pleadings and pertaining to the remedies that are sought. The plaintiffs claimed the following in the statement of claim:

(1) The settlement sum of US$58,000 or its Ringgit equivalent pursuant to the agreement made; or alternatively

(2) Damages and compensation arising from the air-crash causing the death of the deceased;

(3) Interest;

(4) Costs; and

(5) Any other relief as the court may deem just.

It is clear from the plaintiffs' solicitor's letter dated 14 August 1997 and received 19 August 1997 that the defendant's offer of US$58,000 contained in the solicitor's letter of 30 July 1997 was rejected. They sought RM336,000. On 25 August 1997 the defendant's solicitors requested the plaintiffs to reconsider their rejection. There is nothing to show there was any agreement. The plaintiffs' solicitor's reply dated 17 September 1997 to the letter by the defendant's solicitor dated 16 September 1997 withdrawing the offer only confirms that the plaintiffs' solicitors received instructions to accept the defendant's offer on 15 September 1997, but that before the plaintiffs' solicitors could convey it to the defendant's solicitors, the latter had conveyed the withdrawal of the offer on 16 September 1997. It is abundantly clear, therefore, from the contemporaneous documents that the action based upon any agreement must fail.

Now, the Carriage By Air Act 1974 (the Act) was enacted to give effect to the Warsaw Convention as amended at the Hague, 1955 as set out in the First Schedule to the Act, relating to international carriage by air, and to provide for matters connected therewith and ancillary thereto. Section 12 of the Act provides that the Yang di-Pertuan Agong may by order apply provisions of the Convention or the Supplementary Convention together with any other provisions of the Act, to carriage by air generally, not being carriage by air that the Convention or the Supplementary Convention ordinarily applies. Pursuant to s. 12, the Carriage By Air (Application of Provisions) Order 1975 (PU(A) 135) (the Order), provided for the application of certain provisions of the Convention and Supplementary Convention as contained in the Act, and more particularly as set out in the order. The combined effect of the Act and the order is that the terms of the Warsaw Convention apply substantially in a uniform manner regardless whether the flight is international or domestic. The conditions in the ticket might have been written more clearly, but there is nothing in the conditions that is contrary to or is misleading of the applicable laws in Malaysia.

Order 4 of the order provided that s. 5 of the Act shall apply. Section 5 of the Act provided that any liability imposed by art. 17 of the Convention in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of the passenger either under any written law or any rule of law in force in Malaysia relating to fatal accidents due to a wrongful act, neglect or default, and made the provisions of the Third Schedule to the Act to be the applicable provisions. The only basis of claim that may be pursued is therefore under the Act and the order.

The schedule to the order adopted art. 29 of the convention as follows:

(1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived or from the date on which the carrier stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court seized of the case.

The terms of art. 29 differ from the usual terms of the Limitation Act 1953. While the Limitation Act 1953 bars an action, art. 29 extinguishes the right to damages. See *Aries Tanker Corporation v. Total Transport Ltd* [1977] 1 All ER 398 HL. *Yew Bon Tew & Anor v. Kenderaan Bas MARA* [1983] 1 CLJ 11; [1983] CLJ (Rep) 56. The effect is that if an action is not brought within two years of the events stated in art. 29(1), it is extinguished.

Article 29(1) provides that the method of calculating time is to be determined by the law of the court being seized of the case. Otherwise the time from which the time is reckoned is clearly set forth in art. 29(1). While there are provisions with regard to calculation of time in days, there is no special provision in effect in the law of Malaysia with respect to the calculation of time in years. There being no provision to the contrary, the ordinary calculation for time is applicable. The air-crash having occurred on 15 September 1995, the action ought to have been brought at the latest by 14 September 1997. The action for damages and compensation by writ of summons was filed on 8 May 1998. The action was brought seven months three weeks late. That being the case it is clear the plaintiffs' action was filed after the right to damages has been extinguished, and it must therefore fail. The fact that until the letters of administration were issued the plaintiffs had no capacity to act as administrators (see *Ang Hoi Chin v. Sim Sie Hau* [1969] 2 MLJ 3; *P Govindasamy Pillay & Sons Ltd v. Lok Seng Chai & Ors* [1961] 27 MLJ 89) is irrelevant to art. 29(1) which defines the start date for the purpose of calculation of time. The plaintiffs had in fact proceeded with the claim as early as 8 December 1995

and they had in fact obtained Letters of Administration and forwarded the same by 10 June 1996. The defendant's offer was made on 30 July 1997. The plaintiffs were requested to reconsider the offer by letter of 25 August 1997. In all of the circumstances of the case, there is no reason in equity to create and apply a device to suspend time until issue of Letters of Administration since the problem that the plaintiffs encountered in this case is not caused by third parties in late issue of the Letters of Administration but by their own rejection of the very same offer that they purport to accept only when it was too late.

Thirdly, it was argued for the plaintiffs that by asking the plaintiffs to produce the certified copies of the Letters of Administration, the defendant is now estopped from denying liability. Nothing in the response of the defendant directly or indirectly conceded liability to the plaintiffs, and indeed sought proof that they are the lawfully appointed administrators of the estate of the deceased. There is no basis upon which an estoppel may be founded. Furthermore, in the light of the language of art. 29, the right to damages is extinguished if an action is not brought within two years from the date on which the aircraft ought to have arrived at its destination. The offer of 30 July 1997 was clearly made on "without prejudice" basis and cannot therefore be the basis of estoppel, which is an equitable remedy. *Bank of America National Trust Savings Association v. Cheong Hoon Chong* [1982] CLJ 357; [1982] CLJ (Rep) 851 CA is distinguishable on the facts since there was an acknowledgement in that case.

The argument that there was no denial of liability falls since it is based upon communications on 11 January 1996 by Beaumont & Son, as well as letters dated 30 July 1997 and 25 July 1997 which were clearly marked 'without prejudice'. The letter of 7 March 1996 was not marked 'without prejudice', but that letter made no admission of liability but informed the recipient that they were taking their clients' instructions and would revert back. It cannot be concluded therefore that there was any admission of liability as to estop the defendant from denying it.

For these reasons the plaintiffs' claim was dismissed with costs.